IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANDREW P. DICKINSON, Appellant, v. KARI N. WINTHER, Respondent.	No. 37795-1-II UNPUBLISHED OPINION

Hunt, J. — Andrew Dickinson appeals the trial court's summary judgment dismissal of his claims against his former girl friend, Kari Winther, based on his two signed written releases of all claims against her. Dickinson argues that summary judgment was inappropriate because he presented sufficient evidence to establish a question of fact as to whether Winther procured the releases from him through "economic duress." Dickinson also argues that the trial court erred in denying his motion to supplement the record with Winther's deposition testimony and by canceling the lis pendens he had filed against Winther's property. We affirm the trial court's summary judgment and award Winther reasonable attorney fees.

FACTS

I. Background

Kari Winther owned a home in Vancouver, Washington. She met Andrew Dickinson in July 2004 while he was in the process of dissolving his marriage. The dissolution court awarded Dickinson the home he owned with his former wife in Battle Ground, Washington. By the time Dickinson's divorce was final in April 2005, he and Winther "had developed a close personal and

romantic relationship."

A. First Refinance of Dickinson's Battle Ground Home

Dickinson decided to refinance his Battle Ground home. Initially, he planned to borrow $175,000 to pay a $50,000 court-ordered debt to his former wife, his home's then current $96,980 mortgage balance, and other incidental debts and estimated closing costs. Instead, Dickinson and Winther decided that he should borrow $350,000 so that he could also pay off the existing $120,000 mortgage on Winther's home, pay off approximately $3,000 of Winther's credit card debts, and have extra money to "modernize and refurbish" Dickinson's home. Because Dickinson was unable to qualify independently for a $350,000 loan, in June 2005 he added Winther to his home's title so that the lenders could consider her income as well as his. Shortly thereafter, they closed on the $350,000 loan.

As planned, Dickinson and Winther used the proceeds to pay (1) the existing mortgage on Dickinson's Battle Ground home; (2) the $50,000 debt to Dickinson's former wife; (3) the existing mortgage on Winther's home; and (4) various consumer debts belonging to each of them. Dickinson and Winther also opened a joint checking account from which the mortgage holder (US Bank) automatically withdrew the $2,336.56 monthly mortgage loan payments.[1] According to Dickinson, Winther orally agreed to put him on the title to her Vancouver home, but she never did.

[1] According to Winther (in her declaration in support of summary judgment), the monthly mortgage payments were $2,542. We note, however, that the bank statements show monthly withdrawals of $2,336.56. This discrepancy has no bearing on the issues involved in the instant appeal.

Winther and Dickinson orally agreed that (1) Winther and her children would move into the Battle Ground home, (2) Winther would rent out her Vancouver home for $1,200 per month, (3) Winther would apply the rental proceeds toward the monthly mortgage payments on the Battle Ground home, and (4) they would each pay half of the remaining portion of this monthly mortgage payment. Around August, Winther and her children moved into the Battle Ground home; Winther rented her Vancouver home for $1,200; and, as agreed, each month she contributed her rental proceeds to the mortgage payment on the Battle Ground home.

In December, Dickinson and Winther became engaged; but in January 2006, they called off the engagement. Winther and her children moved out of the Battle Ground home and lived with her mother until Winther's renters moved out, at which time she and her children moved back into her own Vancouver home. Nevertheless, Winther and Dickinson continued to see each other, and Winther continued to contribute to the monthly mortgage payments on the Battle Ground home until February or March 2007.

B. Failed Payment on Joint Mortgage Loan

According to Winther, she stopped making these monthly mortgage payments more than a year after moving out of the Battle Ground home, in March 2007, because Dickinson had "stopped making either timely or complete payments to the joint account" and she "could not afford to continue to make the entire monthly mortgage payment [on the Battle Ground home herself]." Clerk's Papers (CP) at 112. Dickinson does not refute these assertions.[2]

[2] In his reply brief, Dickinson states that whether he was continuing to pay his share of the mortgage is "not relevant to the determination of [his] defense of economic duress." Reply Br. of Appellant at 9-10.

On March 14, US Bank, the mortgage holder, sent Dickinson a letter informing him that a recent automatic mortgage payment on the Battle Ground home had failed to clear because there were insufficient funds in the joint checking account.[3] Dickinson immediately called Winther, who informed him that she intended to make no further payments on the loan. That same day, Winther withdrew all remaining funds ($1,325.93) from and closed the joint checking account.[4]

On April 10, US Bank sent Dickinson a second letter, informing him that he needed to pay $5,133.06 to bring the Battle Ground home mortgage payments current. Dickinson sold some personal property to obtain funds to bring the mortgage payments current. He decided the only way he could avoid foreclosure would be to refinance again.

C. Second Refinance and Dickinson's Releases of Winther

In order to refinance, Dickinson needed to remove Winther from the Battle Ground home's title. Dickinson again called Winther, this time asking her to pay him $100,000 and to quit claim her interest in the Battle Ground home back to him. Winther refused. In a later conversation, Winther agreed to quit claim the Battle Ground home back to Dickinson if he would first release her from all further claims and financial obligations.

On June 27, Dickinson met with Winther and signed two releases—a handwritten release he had prepared and a typewritten release Winther had prepared. Winther then executed a quit

[3] It appears that it was the February mortgage payment that failed due to insufficient funds.

[4] Winther used the funds from the account "towards payment of the mortgage, bank charges, and the March 2007 payment for the motor home," which she and Dickinson had jointly purchased and for which Dickinson had stopped making monthly payments after their romantic relationship ended.

claim deed for the Battle Ground home.[5] Dickinson's handwritten release stated:

> Kari Winther owes no money, or payment to Andy Dickinson, and is free and clear of loans, or contracts held against him—
> Andy Dickinson owes no money, or payment to Kari Winther and is free and clear of loans or contracts held against her—

CP at 103.

Winther's typewritten release stated, in material part:

> In consideration of Kari N Winther's release of interest by quit claim deed to Andrew P Dickinson for the property currently jointly owned at 14012 NE 333rd St. Battle Ground WA, I Andrew P Dickinson, release Kari N Winther of any and all financial responsibility, or repayment of any monies regarding her property at 1911 NE Landover Dr. Vancouver, WA 98684. I agree that any amounts previously owed by means of a joint loan through US Bank account . . . have been completely satisfied through the following means as listed below.
> ["Means" include improvements to the property, yard work and landscaping, personal property items left with Dickinson, and various monetary payments.]
> By signing this agreement you Andrew P Dickinson agree to not challenge this agreement or make any future claims against Kari N Winther her interest, estate or family, either in property and or monetary terms in regards to the terms of this agreement. In the event you breach this agreement you (Andrew P Dickinson) agree to pay all attorney fees incurred by Kari Winther regarding this agreement should you choose to challenge this agreement in court.

CP at 95.

After Dickinson filed Winther's quit claim deed, he was able to refinance the Battle Ground home. He borrowed "over $450,000 so that [he] would have sufficient money to pay [his] new $3,962.00 monthly mortgage." CP at 193.

II. Procedure

A. Dickinson's Action Against Winther

[5] Winther later declared that, as part of this transaction, Dickinson released his interest in the motor home that they had purchased. Dickinson had previously refused to sign over title to the motor home unless Winther signed the quit claim deed relinquishing ownership of the Battle Ground house.

On July 23, less than one month after signing the two releases, Dickinson sued Winther in superior court and filed a notice of lis pendens against Winther's Vancouver home. His complaint included the following claims: (1) breach of contract, (2) unjust enrichment, (3) fraud, (4) conversion, and (5) specific performance. He based his breach of contract, unjust enrichment, and fraud claims on the parties' having used the first refinance loan on his Battle Ground home to pay off Winther's mortgage on her Vancouver home and on her failure to add him to the title for her home. Dickinson based his unjust enrichment and conversion claims on Winther's refusal to return her engagement ring to him after their engagement ended. Although Dickinson acknowledged that he had signed the two releases, he claimed he had done so under economic duress. In connection with his specific performance claim, Dickinson asked the trial court to require Winther to add him to her Vancouver home title.

Dickinson also requested the following relief: (1) a money judgment against Winther, in an amount to be determined at trial; (2) return of Winther's engagement ring, or a money judgment for its value; (3) an order requiring Winther to refinance the couple's motor home and to "remove [Dickinson] from all legal obligations associated therewith"; (4) pre- and post-judgment interest; (5) attorney fees and costs; and (6) "such other and further relief as the court deem[ed] just and proper." CP at 12.

B. Summary Judgment

Winther moved for summary judgment. She argued that (1) the releases barred all of Dickinson's claims against her; (2) the statute of frauds[6] barred any claims against her property;

[6] RCW 64.04.010.

(3) the typed release entitled her to attorney fees for having to defend against Dickinson's action; and (4) Dickinson's claim that he had signed the release under "duress" was "fallacious."

Opposing summary judgment, Dickinson argued that the releases he had signed should not bar his claims because he had been forced to sign them under "economic duress, undue influence and/or coercion and/or other similar misconduct." CP at 478 (internal quotation marks omitted). But in his memorandum, he supported only his economic duress defense. He did not address Winther's statute of frauds defense; but he included a statute of frauds heading, under which he wrote: "This section will be supplemented hereafter." CP at 488. He stated that his opposition to Winther's motion for summary judgment was based on his own declaration;[7] declarations by the records custodians of US Bank (the mortgage holder) and the credit union at which Dickinson and Winther had their joint account; and "the pleadings, files and deposition testimony herein." CP at 475.

On December 14, Dickinson filed a motion to supplement the record "with, among other things," a transcript of Winther's deposition and his own declaration.[8] But Dickinson appears to

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[7] In support of his memorandum in opposition to Winther's summary judgment motion, Dickinson declared (in addition to the facts as stated above):

> I objected [to signing the releases], but knew that I had no other reasonable alternative if I wanted to save my home and remaining equity. I was in her control and she knew it. Resort to the courts would take too long at this juncture as I had to refinance immediately and that could only be accomplished by getting Winther to execute a quit claim deed removing her from the title. A lawsuit would unreasonably prolong the situation. By the time the matter was resolved in the court system, I would have lost my home because I would have been unable to refinance without Winther's cooperation. Suing her would not foster a speedy resolution nor motivate her to cooperate.

CP at193.

[8] It does not appear that Dickinson actually attached his supplemental declaration to the motion

have attached (to his motion to supplement) only Winther's deposition transcript and exhibits. Dickinson argued that his attorney had been ill the week leading up to the earlier due date for filing his memorandum opposing summary judgment and, as a result, had accidentally neglected to attach Winther's deposition to that memorandum.

Winther opposed Dickinson's motion to supplement, arguing that (1) the motion was one of many delay tactics, and (2) there was no legal basis to supplement because Dickinson had failed to state what evidence the deposition transcript would establish and had failed to allege that the transcript raised a material issue of fact. She also filed a memorandum rebutting Dickinson's opposition to her motion for summary judgment.

On February 29, 2008, Dickinson moved for an order enlarging time to file a supplemental memorandum or, alternatively, for an order allowing him to file a supplemental memorandum in opposition to Winther's summary judgment motion. He argued that it was necessary for him to file a supplemental memorandum because his attorney's illness had prevented filing an opposing memorandum before the December deadline. In his proffered supplemental memorandum, Dickinson (1) cited "additional relevant law" supporting his economic duress or business compulsion argument; and (2) argued, for the first time, that the statute of frauds did not apply because of "part or full performance," or "promissory estoppel."

Winther opposed Dickinson's motion. She argued that (1) Dickinson did not meet the legal requirements for enlarging time; (2) he did not meet the test for "excusable neglect"; and (3) the citations in his proposed supplemental memorandum were misleading. The trial court denied

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because the clerk's papers contain no such document.

Dickinson's motion to supplement the record and his motion to file supplemental briefing or to enlarge the time.

The trial court granted Winther's motion for summary judgment, ruling that (1) Dickinson and Winther had entered into a valid and binding settlement agreement; (2) Dickinson had not produced evidence showing material issues of fact concerning his alleged duress defense; and (3) Winther was entitled to attorney fees and costs under the settlement agreement. The trial court also canceled Dickinson's lis pendens on Winther's Vancouver home. The trial court orally denied Dickinson's subsequent motion for reconsideration.

Dickinson appeals.

ANALYSIS

I. Summary Judgment

Dickinson argues that the trial court's grant of summary judgment in Winther's favor was improper because he produced evidence of material issues of fact supporting his economic duress claim.[9] Specifically, he argues that there are questions of material fact as to whether (1) he was left with "no reasonable alternative" to signing the releases absolving Winther of all obligations to him; (2) an existing contract obligated Winther to continue paying half of the mortgage on his Battle Ground home; (3) he intended to make Winther a part owner of his home, or whether he put her name on the title only to facilitate refinancing; and (4) Winther breached the implied covenant of good faith and fair dealing by ceasing to make mortgage payments "and then us[ed]

[9] Dickinson also argues that the trial court erred by denying his motion to reconsider the summary judgment. Because the substantive issue is the same, we do not separately analyze the trial court's denial of this motion.

the financial crisis it created for [him] to extort a 'release' from him." Br. of Appellant at 35.

Winther counters that, even taking all facts in the light most favorable to Dickinson, there were no material issues of fact precluding summary judgment on his duress claim because (1) she had a legal right to refuse to release her interest in the Battle Ground home without consideration; (2) a threat to exercise a legal right cannot, as a matter of law, constitute duress; and (3) Dickinson had ample time to consult an attorney or to take other action before signing the documents releasing her from further obligations to him. We agree with Winther and the trial court.

A. Standard of Review

On review of an order for summary judgment, we perform the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp*., 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Civil Rule (CR) 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)).

We consider all facts in the light most favorable to the nonmoving party, here, Dickinson. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton*, 115 Wn.2d at 516). The moving party, Winther, bears the burden of demonstrating that

there is no genuine issue of material fact. *Atherton*, 115 Wn.2d at 516. "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Id*.

Winther met her burden by producing the two releases that Dickinson signed. *See In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993) (moving party has burden to prove no genuine dispute regarding existence and material terms of a settlement agreement). Dickinson does not dispute the existence of the releases, their terms, or that he signed them. Thus, the burden shifted to him to produce material facts showing that Winther procured the releases from him by duress. He failed to meet his burden.

B. Economic Duress/Business Compulsion

Business compulsion, also called "economic duress," "is a species of duress involving involuntary action, in which one is compelled to act against his will in such a manner that he suffers a serious business loss or is compelled to make a monetary payment to his detriment." *Starks v. Field*, 198 Wash. 593, 598, 89 P.2d 513 (1939); *see also Barker v. Walter Hogan Enter., Inc.*, 23 Wn. App. 450, 452, 596 P.2d 1359 (1979). To establish a claim of economic duress, the party asserting duress must produce evidence showing that (1) the offending party applied the immediate pressure; (2) the offending party caused or contributed to the underlying circumstances that led to the victim's vulnerability; and (3) the "immediacy of the situation render[ed] impractical any court action by which the victim might avoid the burden of either of the detrimental choices." *Barker*, 23 Wn. App. at 453.

That the party asserting duress entered into the contract "under stress of pecuniary

necessity" does not constitute business compulsion. *Puget Sound Power & Light Co. v. Shulman*, 84 Wn.2d 433, 443, 526 P.2d 1210 (1974). Nor, as a matter of law, does a threat to exercise a legal right made in good faith constitute duress. *Pleuss v. City of Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972). A person makes a threat in good faith if she makes it "in the honest belief that valid grounds exist to justify the action threatened." *Id*. at 138. Such is the case here with Winther's demand that Dickinson sign the releases in exchange for her signing the quitclaim deed releasing her legal interest in the Battle Ground property.

Dickinson failed to produce evidence meeting the basic definition of "economic duress": The claims that Dickinson released were based on his personal relationship with Winther, not on a business relationship; thus, any loss that Dickinson may have suffered as a result of signing the releases was not a business loss. Nor was Dickinson compelled to make a monetary payment to his detriment. *Starks*, 198 Wash. at 598; *Barker, Inc.*, 23 Wn. App. at 452.

Moreover, even if we were to ignore his failure to meet the basic definition of "economic duress," Dickinson produced insufficient evidence to establish a question of fact as to any of the three criteria necessary to substantiate his claim of economic duress. *See Id*. at 453. First, Dickinson failed to produce evidence showing that Winther "applied the immediate pressure" that produced the alleged duress: The immediate pressure Dickinson asserted was the potential threat of foreclosure on his Battle Ground home if he was unable to refinance it or to persuade Winther to pay half the mortgage. But it was not Winther who was threatening to foreclose; it was US Bank, the mortgage holder, who was applying that pressure.

Second, it is not clear under the circumstances presented that Winther's ceasing to make

payments "caused or contributed to the underlying circumstances [that] led to the victim's [here, Dickinson's] vulnerability."[10] *Id*. at 453. On the contrary, the undisputed facts showed that Dickinson's own failure to deposit his share of the mortgage payments on the Battle Ground house caused the joint account's insufficiency of funds that led to the missed February 2007 payment.

Moreover, "[w]hether Dickinson did or did not miss paying his share of the monthly mortgage payments for a brief time is a factual question," Reply Br. of Appellant at 9, is not a *disputed* fact. Winther stated in her declaration that Dickinson "had stopped making either timely or complete payments to the joint account." CP at 112. Dickinson did not rebut this assertion in his later-filed declaration in opposition to summary judgment; thus, there is no genuine dispute as to Dickinson's failure to make his share of the payments. Nor did Dickinson dispute Winther's declaration that she ceased making her monthly contributions to the joint account only *after* Dickinson stopped making his share of the payments. She had been faithfully making monthly mortgage payments for over a year, even after she moved out of the Battle Ground house, until Dickinson's failure to continue making *his share* of the payments rendered her unable to pay the

[10] Assuming, without deciding, that there are material issues of fact about whether Winther contributed to Dickinson's vulnerability to foreclosure of the Battle Ground house, Dickinson's economic duress claim would fail because he has not established questions of fact regarding the other two criteria. Even looking at the facts in the light most favorable to Dickinson and assuming that Winther's stopping payments contributed to the foreclosure threat, Winther was not solely responsible for the threatened foreclosure, as we explain above. More importantly, that Dickinson signed the releases "under stress of pecuniary necessity" is not legally relevant to his "business compulsion" or economic duress claim. *Puget Sound Power & Light Co.*, 84 Wn.2d at 443.

entire mortgage.[11]

Third, Dickinson also failed to produce evidence showing that "the immediacy of the situation render[ed] impractical any court action by which [he] might [have] avoid[ed] the burden of either of the detrimental choices." *Barker*, 23 Wn. App. at 453. Dickinson claimed that he was "forced" to choose between signing the releases or losing his home to foreclosure. Dickinson declared:

> Resort to the courts would take too long at this juncture as I had to refinance immediately and that could only be accomplished by getting Winther to execute a quit claim deed removing her from the title. A lawsuit would unreasonably prolong the situation. By the time the matter was resolved in the court system, I would have lost my home because I would have been unable to refinance without Winther's cooperation. Suing her would not foster a speedy resolution nor motivate her to cooperate.

CP at193.

Yet despite becoming aware by mid-March that Winther was refusing to make further mortgage payments on the Battle Ground house, Dickinson did not sign the releases until June 27, approximately three and a half months later. His conclusory assertion that court action was impractical is not sufficient to show a material issue of fact as to the immediacy of his economic situation, absent evidence that he investigated legal recourse during this three-month period.[12]

Furthermore, Dickinson presented no evidence that refinancing the Battle Ground house

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[11] At oral argument, Dickinson asked us to infer that he had continued to make his mortgage payments, in spite of his failure to rebut Winther's contrary assertion. Based on the record before us, we cannot make what appears to be an unreasonable inference. Accordingly, we reject this request.

[12] We further note that he quickly filed his lawsuit against Winther less than four weeks after he signed the releases.

was actually necessary or that foreclosure was actually imminent. On the contrary, he was able to sell some personal property to bring the mortgage loan current. He was also apparently able to continue making the monthly mortgage payments until at least June. And, after refinancing, he was apparently able to afford his new, higher, $3,962 mortgage payment each month. We agree with the trial court that Dickinson did not substantiate his claim of economic duress.

C. Pattern Instruction Has Not Been Adopted in Washington

Dickinson also argues that "WPI 301.10[13] is the accepted law in Washington for determining economic duress." Br. of Appellant at 23. Washington courts have neither considered nor adopted WPI 301.10 as a correct statement of the law. *See* WPI 301.10, comment at 197 (noting Washington courts have not adopted this approach). Therefore, we do not further address this argument.

D. Statute of Frauds and Part Performance

The trial court did not consider Winther's statute of frauds argument because it granted summary judgment on the basis of the releases that he signed. Because we affirm the trial court's grant of summary judgment to Winther based on Dickinson's signing of the releases, as well as his failure to establish his allegation of economic duress, we need not address this issue.

E. "Other Contractual Defenses" Did Not Bar Summary Judgment

Dickinson also argues that summary judgment was improper because "the 'releases' could still be held invalid and unenforceable on the basis of the other contractual defenses." Br. of

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[13] 6A Washington Practice: Washington Pattern Jury Instructions: Civil 301.10, at 196 (2005) (WPI). This instruction, which is generally based on the Restatement (Second) of Contracts §§ 175 and 176 (1981), provides:

> A party may rescind a contract on the ground of duress if the party proves by clear, cogent, and convincing evidence that [he] [she] [it] agreed to the contract because of an improper threat by the other party that left no reasonable alternative.
>
> A threat is improper if _____.
>
> [A threat to exercise a legal right, made in good faith, is not improper.]

WPI 301.10 provides that the phrase "A threat is improper if ____" should be completed by "the appropriate phrase from the Comment below." Contrary to Dickinson's contention, that an instruction appears in the WPI does not establish acceptance of that instruction as an accepted statement of Washington law. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) ("Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court.").

Appellant at 34. Specifically, he claims that he limited his defense against Winther's summary judgment motion to his duress claim because Winther had limited her motion to duress and "ignored all other contractual defenses including, but not limited to, undue influence, coercion, overreaching, etc." Br. of Appellant at 34. This argument also fails.

Dickinson misapprehends the burden of production at summary judgment. Because Winther proved the existence and material terms of the releases he signed, the burden shifted to Dickinson to produce evidence of any defenses he wished to assert. *Atherton*, 115 Wn.2d at 516; *Ferree*, 71 Wn. App. at 41. Because Dickinson did not assert and substantiate these other defenses in the trial court, we do not consider them for the first time on appeal.[14] Rules of Appellate Procedure (RAP) 9.12 (on review of summary judgment, appellate court will consider only issues called to trial court's attention); *see also Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 510, 182 P.3d 985 (2008) (declining to consider issue embedded, but not argued, in trial brief). Moreover, he fails to support these other defenses with legal argument in his briefs on appeal as RAP 10.3(a)(6) requires. Accordingly, we do not consider them.

[14] Although Dickinson mentioned these other defenses below, he presented no legal argument in support. Rather, he presented argument on only duress.

II. Motion to Supplement Record[15]

Dickinson argues that the trial court abused its discretion when it refused to allow him to supplement the record with Winther's deposition transcript.[16] He contends that the trial court should have allowed him to supplement the record "to provide the court with a complete record prior to making a decision on summary judgment." Br. of Appellant at 37. The record does not support this argument. As Winther asserts, her deposition and other materials did not include new information that had not already been presented in the parties' competing affidavits.

A party may file affidavits and other matters until the trial court enters a formal summary judgment order. *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691, *review denied*, 78 Wn.2d 994 (1970) (citing *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 398 P.2d 888 (1964)). But the trial court's refusal to allow supplementation is not grounds for reversal where the proposed supplemental material does not "change or contradict any of the factual matters before the trial court so as to raise an issue of material fact." *Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 727, 684 P.2d 719, *review denied*, 102 Wn.2d 1005 (1984). Such is the case here.

Dickinson does not explain how Winther's deposition testimony would have changed or

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[15] At oral argument before us, Dickinson again attempted to move to supplement the record—this time with an unsubstantiated assertion that Winther has conveyed a half interest in her property to a third party. On review of an order on summary judgment, we consider only evidence called to the trial court's attention. RAP 9.12. Dickinson made no showing that he has called this conveyance to the trial court's attention, that the trial court has made any finding concerning this factual assertion, or that this purported transaction is relevant. Thus, we deny his oral motion to supplement the record.

[16] Dickinson also assigns error to the trial court's denial of his motion to enlarge time to file a supplemental memorandum, but he does not develop or support this alleged error with argument in his brief, as RAP 10.3(a)(6) requires. Therefore, we do not further consider this issue.

contradicted the factual matters set forth in the parties' declarations already before the trial court. Furthermore, none of the disallowed deposition testimony raises issues of material fact as to whether Winther obtained the releases from Dickinson by duress. We hold, therefore, that the trial court did not abuse its discretion in refusing to allow supplementation of the record with Winther's deposition.[17]

III. Cancelation of Lis Pendens

Dickinson next argues that the trial court abused its discretion by canceling the lis pendens on Winther's property because he will be without a remedy if he prevails on this appeal. Dickinson asks "for reinstatement of the [l]is [p]endens retroactive to the date of its original filing." Reply Br. of Appellant at 13. Agreeing with the trial court that Dickinson released any claim to Winther's Vancouver property when he signed the releases, he has no interest in her property on which he filed his lis pendens. Accordingly, we affirm the trial court's cancellation of the lis pendens and do not further address Dickinson's argument on this point.

IV. Attorney Fees

Winther requests attorney fees on appeal based on the attorney fee provision incorporated into the typed release that Winther prepared and Dickinson signed. A party may recover reasonable attorney fees on appeal if allowed by statute, rule, or contract[18] and the party makes a

[17] Even assuming, without deciding, that the trial court erred by refusing to allow Dickinson to supplement the record with Winther's deposition, any such error is harmless and, therefore, not grounds for reversal.

[18] We have already rejected Dickinson's argument that the release is not binding because he signed it based on economic duress. Thus, he does not show that the release was invalid or that this contract is otherwise unenforceable.

request according to RAP 18.1(a). *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003).

The release that Dickinson signed entitles Winther to attorney fees if Dickinson violates its terms. Dickinson violated the terms of this contractual release by filing the instant lawsuit against Winther.[19] Therefore, we award Winther reasonable attorney fees in an amount to be determined by our court commissioner upon Winther's compliance with RAP 18.1(d).

We affirm the trial court's summary judgment in favor of Winther and award Winther reasonable appellate attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.

[19] The typed release that Dickinson signed provided, in pertinent part:

> By signing this agreement *you Andrew P Dickinson agree to not challenge this agreement or make any future claims against Kari N Winther* her interest, estate or family, either in property and or monetary terms in regards to the terms of this agreement. *In the event you breach this agreement you (Andrew P Dickinson) agree to pay all attorney fees incurred by Kari Winther* regarding this agreement should you choose to challenge this agreement in court.

CP at 95 (emphasis added).